APPENDIX

A

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

Equity No. D-6078

THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

vs.

PRINCE GEORGE'S COUNTY, MARYLAND, ET AL

Opinion and Order

This matter comes before the Court as the result of disagreements between Prince George's County and the Maryland National Capital Park and Planning Commission over the legal interpretation and effect of the Prince George's County Charter upon the powers, duties, personnel and funding of the Commission. The County takes the position that the Commission is a creature of public local law and is subordinate to any provision of the Charter which may directly or indirectly be applied to it or in the alternative that the Charter and the laws creating the Commission are of equal dignity and should be construed to provide "functional interplay between them so as to fully effectuate any express Charter provisions where there is no conflicting provision in the laws creating and governing the Commission".

The Commission on the other hand takes the position that it is a creature of the Legislature, separate, distinct and independent from the County government (of the County within whose territorial boundaries part of its territorial jurisdiction lies) and it is, therefore, not subject to the provisions and requirements of the Prince George's County Charter, notwithstanding the fact that the Charter was adopted subsequent to the laws which as enacted and amended created the Commission and provided guidelines for its operation and financial support.

In order to resolve the legal issues raised by the conflicting interpretations of the various laws utilized by the County Attorney for Prince George's County and the General Counsel to the Commission, each of whom have rendered numerous written opinions and written voluminous Memoranda to their respective principals, upon a substantial portion of which the County at least has acted or indicated its intention to act forthwith, the Commission brought this action seeking injunctive relief and declaratory relief.

The Right of the Commission to Sue and the Existence of a Justiciable Controversy

It would seem that as a preliminary matter the Court ought to consider whether or not the Commission has the power and standing to bring this action. The County takes the position that since it provides the funds with which the Commission operates the activities it carries on in Prince George's County from taxes on Prince George's County property, the Commission is a subordinate agency to the County government and, therefore, has no standing to sue its principal. The County argues that unless it has administrative and financial control over the Commission that the Commission constitutes a separate County government within the County in degradation of the plan of home rule. The County also bolsters its argument in this field with the contention that the laws creating the Commission are really public laws and are, therefore, repealed by the adoption of the Charter. To support the contention that these are public local laws and the matters that they deal with are of particular local concern, the County points to the fact that the Commission acts through separate planning boards for each County and submits separate budgets to each County government and is supported by taxes levied in different amount in each County (which are levied upon property in that County only). The Court is unable to agree with or adopt this line of reasoning. The Act which created the

Commission manifestly dealt with matters of concern to two or more Counties. A single Commission for territory in both Counties was created by the Legislature, as it had the power to do, and all laws providing for such Commissions or agencies are by definition in the Constitution public general laws regardless of where they may be codified. *Constitution of Maryland, Article XI-A, Prince George's County v. City of Laurel, 262 Md. 171. Barranca v. Prince George's County, 264 Md. 562. Bowie v. Washington Suburban Sanitary Commission, 249 Md. 611.* Even if this were not so, it would seem that the provisions of Section 11 of Chapter 780 of the Laws of Maryland, 1959 would be determinative on this point. This Section provides among other things that "the Commission . . . has the right . . . to sue and be sued". We conclude, therefore, that the Commission, as a separate and independent legal entity provided by statute with authority to sue and be sued, has the power to maintain this suit. We further conclude that as a creature of public general law, its power to do so is not curtailed or inhibited by any provision of the Prince George's County Charter.

We are also unable to agree with the County's position that there exists no justiciable controversy. In considering this matter as a preliminary question, the Court found that the County sought to impose upon the officers and employees of the Commission under General Provisions Restriction 1005 of the Charter the provision thereof forbidding them to lobby, testify or furnish information before the Legislature without permission from the County; that the County asserted the right not to levy the specific special taxes provided by statute to support the Commission; that the County asserted the right to determine the number of employees of the Prince George's County Planning Board and to refuse to fund positions for this Board and use these funds to fund similar positions on the County Executive's Administrative Staff. The County asserted the right to di-

rect and control litigation to which the Commission is a party and to abolish the legal staff of the Commission and provide those services through the office of the County Attorney. A more deliberate perusal of the pleadings might disclose other areas of dispute, but we were of the opinion when first considered, and are still of the opinion, that at least those matters go to the very foundation of the functioning of the Commission and constitute a justiciable controversy upon the assertion of the right by the County and an indication on its part that it intends to act forthwith upon the rights asserted. We conclude, therefore, that the exercise by the County of the rights which it asserted could have far-reaching and possibly irrevocable effects upon the functioning of the Commission and that such a state of affairs poses questions ripe for adjudication by a declaratory judgment proceeding.

Questions Presented

The Bill of Complaint enumerates many areas of conflict and dispute upon which declaratory relief is sought and the Court intends at the conclusion of this Opinion to deal with them *seriatim*; however, we think that the basic underlying differences are relatively simple and uncomplicated and can be briefly stated this way:

Do the Charter provisions, which may be directly or indirectly applied to the operations and personnel of the Commission, control or is the law, which creates the Commission and prescribes its composition, territorial jurisdiction, duties and method of financial support, a public general law which is uneffected by the subsequent adoption of the Prince George's County Charter?

Conclusions

We hold that the law which created the Commission is a public general law and that it is uneffected by the subsequent adoption of the Prince George's County Charter. The

law creating the Commission contains in many places language which indicates that the Legislature intended it to exercise the authority conferred upon it without respect to the operation of the local government within whose territorial jurisdiction it is operating. An example of one of these may be found in Chapter 780, Section 57(d)(3), Laws of Maryland, 1959, which says in part:

> "No municipal corporation within . . . the Regional District shall be authorized by means of an amendment to its Charter or otherwise, to exercise any of the powers relating to planning, sub-division control, or zoning now or hereafter granted by this Article to the Commission or the County Commissioners of Prince George's County. . . . . ."

Further to this effect are the provisions of Section 85 of the same Chapter:

> "Effect of State-Wide Zoning Law.
>
> (a) In municipalities.—Within the Regional District, the zoning powers of them vested by Article 66B of the Annotated Code of Maryland in any municipality or council of any municipality within the Regional District shall be construed to be vested exclusively in and may be exercised within their discretion only by the County Council of Montgomery County or the County Commissioners of Prince George's County, each acting respectively as a District Council.
>
> (b) In planning commissions or boards of appeals.—Within the Regional District any power vested by Article 66B of the Annotated Code of Maryland in any plannnig commission or board of appeals shall be construed to be vested exclusively in and may be exercised only by the Commission or the respective Boards of Zoning Appeals created or authorized by this sub-title.

> **(c) This sub-title prevails.—Insofar as the provisions of Article 66B of the Annotated Code of Maryland may be inconsistent with or contrary to the provisions of this sub-title, such provisions of Article 66B shall have no application within the Regional District."**

The County attempts to rely for part of their argument upon the proposition that if home rule is to mean anything, the powers granted by Chapter 614 of the Acts of 1959 dealing with planning and zoning must be held paramount for them. If, however, one reads that Chapter in its entirety, it is apparent that the Legislature foresaw the possibility of conflicts between Chartered Counties exercising "express powers" and the Commission because it provided in Section 2 of that Chapter as follows:

> "Sec. 2. And be it further enacted, that in so far as the provisions of this sub-section may be inconsistent with or contrary to the provisions of the Maryland-Washington Regional District Act, as enacted by Chapter 992 of the Acts of 1943 and any amendments thereto, the provisions of this sub-section shall have no application so long as such District Act is in force and effect and nothing contained herein shall be deemed or construed to affect the validity or operative effect, of said Chapter 992 of the Acts of 1943 as amended, which established City and Regional Planning in Montgomery and Prince George's Counties within the limits of the Maryland-Washington Regional District as said District is now or shall hereafter be defined by Law."

The Court is driven inescapably to the conclusion that the Legislature did not intend nor did it diminish in any way the powers of the Commission by granting to Chartered Counties planning and zoning under the express powers provision of this Chapter and that the adoption of a Charter by Prince George's has no effect whatsoever so far as planning and zoning is concerned upon that portion

of Prince George's County lying within the boundaries of the Regional District. The County cites as authority to the contrary the case of *Dal Maso v. Board of County Commissioners for Prince George's County, No. 272, in the Court of Appeals, September Term, 1971.* We have carefully scrutinized this Opinion and are of the opinion that it is not controlling upon the matters here presented. Since the Court of Appeals concluded that the provisions of the Prince George's County Charter purporting to abolish floating zones were controlling upon the issues there presented, we can only conclude that the property which was the subject of that zoning case was not within the Regional District and it was, therefore, controlled by the Chapter rather than the provisions of the Zoning Ordinance adopted for the portion of Prince George's County lying within the Regional District by the District Council, who are the exclusive zoning authority for the Regional District in Prince George's County and whose zoning ordinance could not have been effected by the adoption of the Charter.

The Court's attention has been called to the case of *Clayman, et al. v. Prince George's County, et al,* now pending as *Case No. 322, in the Court of Appeals, September Term, 1971;* however, that case has not yet been decided so far as the Court knows.

The Court concludes that the fact that the statute creating the Commission provides for appointment of certain of its members by each of the respective County governments does not make those officers County employees nor one so appointed thereafter subject to direct control in his official actions by the respective County governments who have the power to appoint or remove them. Once appointed they become State officers dependent upon the public general law for their official existence and answerable to its provisions or through its provisions for their conduct in office. It follows from this reasoning that the provisions of the Charter regulating County officials or employees are

not applicable to members of the Commission or its employees.

The Court concludes further that the Commission is not an agency which receives or disperses County funds as that terminology is used in the Prince Georger's County Charter. Funds which the Commission receives it receives as a result of provisions of a public general law and such funds, therefore, cannot, we think, be construed as "County funds" for the purpose of bringing the Commission with the auditing requirements of the County Charter.

Finally the Court finds as a fact that the Commission is entitled to declaratory relief and the Court makes the following declarations:

1. The Maryland-Washington District Act as enacted in Chapter 780 in the Laws of Maryland 1959 as amended is a public general law.

2. Prince George's County may not exercise the powers of planning and zoning within the "Regional District" and that provisions of Article 7 of the Prince George's County Charter are not applicable to that portion of Prince George's County lying within the "Regional District."

3. Section 709—Conflicts of Interests—of the Prince George's County Charter does not apply to the members of the Commission or its employees.

4. The Commission and the Prince George's County Planning Board are not "agencies which receive and disburse County funds" within the meaning of that phrase as used in Section 1005 of the Prince George's County Charter and are not subject to the provisions of that Section.

5. The tax provided in Chapter 732, Laws of Maryland, 1970, must be levied by the Prince George's County Council and the proceeds thereof remitted to the Prince George's County Planning Board as provided by law.

6. Prince George's County cannot compel the merger of the legal staff of the Commission with the legal staff of the County, nor can it deduct from funds due the Commission the cost of legal services and provide same in kind through the office of the County Attorney.

7. The Prince George's County Planning Board is not an "agency which receives or disburses County funds" as that terminology is used in Section 313——Office of Audits and Investigations—of the Prince George's County Charter and is, therefore, not subject to the requirements of that Section of the Charter.

8. The Prince George's County Planning Board is not subject to the provisions of Section 501—Supervision and Control—of the Prince George's County Charter.

9. Prince George's County may not by Executive Order effect a transfer of the Commission's staff positions.

10. Taxes levied and collected on behalf of the Commission pursuant to public general law are not "County funds" as that terminology is used in Section 804(b)—Definition of Terms Used in this Article—of the Prince George's County Charter.

11. The Prince George's County Planning Board is not an "agency which disburses or receives County funds" by virtue of the definition of County government as that definition appears in Section 804(a)—Definition of Terms Used in This Article—of the Prince George's County Charter.

12. The Prince George's County Planning Board is not subject to the provision of Section 806—Formulation of Capital Budget and Capital Program—of the Prince George's County Charter.

13. The Prince George's County Planning is not subject to the provisions of Section 807—Formulation of Current expense Budget—of the Prince George's County Charter.

14. Prince George's County must levy and remit to the Prince George's County Planning Board the mandatory *ad valorem* taxes required by the public general law.

15. The Prince George's County Planning Board is not subject to the provisions of Section 1017(m)—Definitions and Rules of Construction—of the Prince George's County Charter.

16. The Prince George's County Council has the authority, jurisdiction and power to levy "discretionary taxes" to be collected on behalf of the Prince George's County Planning Board pursuant to public general law and that such taxes when levied and collected are not "County funds" as that terminology is used in any of the several Sections of the Prince George's County Charter where this term appears.

17. Taxes levied and the proceeds thereof collected, whether they be the mandatory taxes required by the public general law or "discretionary taxes" authorized and permitted by the public general law, may not be included in the Prince George's County general fund.

18. The Interlocutory Injunction granted by Order of the Court dated June 2, 1971 will be made final.

Order

It is thereupon this 6th day of July, 1972, by the Circuit Court for Prince George's County, Maryland, in Equity,

ADJUDGED, ORDERED and DECREED that the Interlocutory Injunction provided by the Court's Order dated June 2, 1971 BE and the same Is hereby made a Final Injunction.

PERRY G. BOWEN, JR.
Judge

B

Supplemental Opinion of August 3, 1972

Subsequent to the filing of the original Opinion in this case on July 6, 1972, the Defendant filed a petition for Rehearing and for Clarification of the Opinion and Modification of Decree, together with a Memorandum of Points and Authorities. This matter was heard in Open Court on July 20, 1972 at which time the Plaintiff appeared and opposed both the Rehearing and the requested Modification of the original Opinion.

The Court points out that the original Opinion, which was entitled Opinion and Order, was not intended as the Final Decree in this case, but only as an Opinion and Interlocutory Order to the extent that it continued the Injunction heretofore entered. It was contemplated, and counsel were advised at the hearing, that they were expected to prepare a Final Decree in accordance with the Court's Opinion and submit it for signature in accordance with the standard equity practice in this jurisdiction.

In its Petition for Rehearing the Defendant listed fourteen (14) matters upon which it requested further clarification or declaration from the Court. It is true, as the Plaintiff argues, that the Defendant has steadfastly resisted the Court assuming jurisdiction in this matter, has contended it is not a justiciable controversy and filed no application for declaratory relief in its own right. Notwithstanding these facts, however, the Court feels that, in the interest of having all possible matters resolved in this case, as opposed to a piecemeal handling in other cases in the future, those points which can be identified and dealt with in this proceeding ought to be disposed of in the interest of the public bodies involved and of the public in general. For this reason, the Court has considered the Defendant's Petition and has concluded to deal with such of the matters raised as have been, we think, fairly raised, argued and covered by the evidence presented.

The Court will take up these questions, therefore, in the order presented in the Petition for Rehearing:

1. The Court concludes that the District Council and its individual members are not proper party Defendants in this case and that they should, therefore, be dismissed.

2. The Defendant contends that the *ad valorem* taxes which admittedly are levied at different rates in different parts of the Regional and Metropolitan District are unconstitutional under Article 15 of the Declaration of Rights of the Maryland Constitution. This Section provides, among other things, "that the General Assembly shall by uniform rules provide for the separate assessment, classification and sub-classification of land, improvements on land and personal property, as it may deem proper; and all taxes thereafter provided to be levied .... by the Counties .... shall be uniform within each class or sub-class ....."

We are unable to agree that the provisions of this Article make unconstitutional the levying of taxes at different rates on land lying in Montgomery County as opposed to land lying in Prince George's County, or upon land lying in one District of Prince George's County as opposed to another District in Prince George's County. The Court of Appeals has held in *Miller v. Wicomico County, 107 Md. 438,* "the Legislature may create separate taxing Districts provided the rate is equal and uniform as to all property within the District". And in *Rogan v. Commissioners of Calvert County, 194 Md. 299,* "the Legislature has power to divide a County into taxing Districts and each County or taxing District can have its own rate of taxation without contravening the provisions of this Article". Both of these cases appear in the annotations to this Article.

For these reasons the Court declares that the taxing scheme embodied in the Act creating the Plaintiff is not unconstitutional under the provisions of Article 15 of the Declaration of Rights to the Constitution of Maryland.

3. The County urges that that portion of the Express Powers Act which is identified as Section 2 of Chapter 614 of the Acts of 1959 and is set out in full on Page 6 in the Court's prior Opinion violates Article XI-A, Section 2 of the Maryland Constitution in that if it is given effect the General Assembly did not treat Chartered Counties on a uniform basis with respect to the powers granted them. The Court can find no requirement in this Article that the Legislature was expressly empowered to make non-uniform provisions for Chartered Counties. The language deemed pertinent by the Court is as follows:

> **"Such express powers granted to the Counties shall not be enlarged or extended by any Charter formed under the provisions of this Article, but such powers may be extended, modified or repealed by the General Assembly."**

If the word "modified" is to receive the definition usually given to it, it would seem that the Legislature has the power to modify its grant of express powers to Chartered Counties. We understand the Court of Appeals reached a similar conclusion in a case involving construction of the Express Powers Act for municipal corporations wherein a similar argument was made by New Carrollton, although we have not had the benefit of this Opinion because it is not yet available here.

The Court, therefore, declares that Section 2, Chapter 614 of the Acts of 1959 is not unconstitutional under the provisions of Article XI-A, Section 2 of the Constitution of Maryland.

4. The County asks the Court to declare that Section 8 of the Schedule of Legislation in the Prince George's County Charter, titled Department of Recreation, repeals and supercedes Chapter 732 of the Acts of 1970 which transferred to and brought under the jurisdiction of the Plain-

tiff all the functions and activities of the Recreation Department in Prince George's County.

We think that the question here presented must be resolved upon the same broad conclusion we reached as the basis for those declarations in the original Opinion, which is, that a public local law cannot repeal or amend or change an inconsistent public general law. This brings us to the question of whether or not Chapter 732 of the Acts of 1970 is a local or public general law. We conclude that it is a public general law. The purpose of Chapter 732 of the Acts of 1970 is stated therein to be:

> "To provide for the transfer, regulation, operation and maintenance of all recreation functions, programs, facilities, and merit system personnel of the Prince George's County Recreation Department by and to The Maryland National Capital Park and Planning Commission, to establish the taxing authority thereto, and *to provide a program of recreation within Prince George's County and the coordination of such program with the Commission's Park functions.*" (Italics for emphasis supplied)

The Court declares, therefore, that Section 8 of the Charter did not repeal or abrogate the provisions of Chapter 732 of the Acts of 1970.

5. The Defendant asserts that the auditing power provided in Chapter 644 of the Acts of 1963 and reenacted and codified as Section 18-1(B)8 by Chapter 898 of the Acts of 1965 applies to the Defendant.

The Court concludes that this is one of those Acts to which the principle of "functional interplay" may be applied and we hold, therefore, that the internal auditor of Prince George's County, or his successor in title and function, "at the request of the President of the Board of County Commissioners", or his successor in title and function, may "examine the financial operations" of the Plain-

tiff in any year in "which it receives funds from the budget of the Board of County Commissioners", or its successors in title and function, "or from the County tax revenues as approved by the Board of County Commissioners", or its successors in title and function. With respect to the character of the funds received by the Plaintiff, the Court reaffirms its declarations Numbered 16 and 17 of the original Opinion.

6. & 7. The Court will consider these propositions of the Defendant together. Basically, they raise the question of whether or not conditional zoning is constitutional and, if so, whether or not the provisions authorizing conditional zoning were repealed by the subsequent enactment of a law requiring uniform regulations in separate use districts.

The Court expresses no opinion upon the constitutionality *vel non* of Chapter 471 of the Acts of 1968 in that it does not recollect that any constitutional objections were offered to this Act during the course of the trial. The attack upon it was based entirely upon the provisions of the Prince George's County Charter. Once again the Court concludes that this Act is a part of the public general law and was not, therefore, effected by the adoption of the Charter.

As an additional ground, the Defendant urges that this Act was repealed by the provisions of Chapter 711 of the Acts of 1969. The Court considers in resolving this question that the reasoning and conclusions of the Court of Appeals in *Prince George's County v. McBride, 263 Md. 235* are controlling. Applying our understanding of that case to the instant question, we conclude that Chapter 471 of the Acts of 1968 was not repealed by Chapter 711 of the Acts of 1969; that the latter Chapter expressly repealed Sections 59-83 of the Code of public local laws of Prince George's County, 1963 Edition and 1967 Supplement. It did not expressly repeal Chapter 59-83G which was enacted as Chapter 471 of the Laws of 1968. We think that both of these Acts can be read together and full effect given to both so

that there is, therefore, no repeal by implication of Chapter 471 of the Acts of 1968 by Chapter 711 of the Acts of 1969.

8., 9. & 10. With respect to Defendant's requests in Nos. 8, 9 and 10, the Court feels that they are fully covered in the original Opinion and declines to further modify its position taken therein.

11. The Defendant urges the Court to declare that the Plaintiff is subject to the control of the Defendant pursuant to and in those areas covered by Chapter 97 of the Acts of 1970. An examination of that Chapter leads the Court to the conclusion that it is Section 231-L upon which the Defendant relies. That Section reads in pertinent part:

> "A .... Commission .... or other agency of the State government which receives more than one-half of its regular annual operating expenses from a political subdivision of this State is not a 'using authority' within the meaning of .... this Article ...."

> "As to any such .... Commission .... or other agency the political sub-division from which it receives more than one-half of its regular annual operating expenses shall hereafter have the responsibility for the purchasing program and all other budget and fiscal matters and any such .... Commission .... or other agency shall be subject to the budget and fiscal procedures and the purchasing laws and regulations of such political sub-division now or hereafter in effect."

"Using authority" is defined in this Act as "every" department, board, commission, bureau, division, institution and agency of this State.

The question of whether or not this Act applies to the Plaintiff herein, once again, we think depends upon how you define the funds supplied to the Plaintiff by virtue of the scheme setup for its financial support in the Act which created it. In the original declarations the Court found that

whether mandated or discretionary, these taxes once levied were not County funds. Applying that reasoning to the resolutions as posed, the Court concludes that if more than half of the Plaintiff's operating budget is derived from such taxes, whether mandated or discretionary, the provisions of Section 231-L of this Act do not apply to it. If more than one-half of the operating funds of the Plaintiff in any given year are supplied from the general funds of Prince George's County, it would seem conversely that the provisions of this Act would apply to it. Upon the evidence adduced in this cause, the Court declares that to this point in time the provisions of Section 231-L of Chapter 97 of the Act of 1970 do not apply to the Plaintiff in such a way as to subject it to the budget and fiscal procedures and the purchasing laws and regulations of Prince George's County.

12. We feel that No. 12 has been disposed of by the preliminary paragraphs of this Supplemental Opinion.

13. We agree with the Defendant that with the filing of the Final Decree in this case the Interlocutory Injunction heretofore entered will no longer be proper and doubtless no longer necessary. It was the intention of the Court in its Order attached to the original Opinion heretofore filed to extend that Interlocutory Injunction only to the point where the Final Decree would be filed and to that point only because there might be some question about the levying of taxes for the current fiscal year. There will be attached to this Opinion an Order modifying the former Order to that extent; it being the clear understanding of all counsel and the Court that the time for appeal would run only from the date the Final Decree, which is required to be prepared and submitted by counsel, is enrolled.

14. The Defendant's fourteenth proposition requests the Court to rule upon a question involving the validity of Section 2 of Chapter 614 of the Acts of 1959 in the light of the Fourteenth Amendment to the United States Constitution. This matter was not heretofore covered in depth

and no evidence was offered, that the Court can recollect, bearing on it. Further, it would seem that this matter was abandoned by the County in argument upon the Petition for Rehearing as the Court's notes taken at that time fail to show any consideration of this matter. In any event, the Court does not feel justified in deciding this matter on the present state of the record, and we decline to make any finding with respect thereto.

Order

It is thereupon this 3rd day of August, 1972, by the Circuit Court for Prince George's County, Maryland,

ADJUDGED, ORDERED and DECREED that that portion of the Court's Order dated July 6, 1972 purporting to make the Interlocutory Injunction provided by the Court's Order dated June 2, 1971 a Final Injunction BE and the same Is hereby continued in full force and effect until such time as a Final Decree is enrolled in this cause.

/s/ PERRY G. BOWEN, JR.
JUDGE

C

MARYLAND RULES OF PROCEDURE

Rule 826. Record on Appeal.

e. Approval of Record by Lower Court Not Necessary.

It shall not be necessary for the record on appeal to be approved by the lower court except as provided in sections c 2 or g of this Rule, but if any difference arises as to whether the record truly discloses what occurred in the

lower court, the difference shall be submitted to and settled by the lower court and the record to conform to the truth.

(C. of A. 10, § 4.)

D

MARYLAND RULES OF PROCEDURE (1972 ED.)

APPEALS TO THE COURT OF APPEALS

SCOPE OF REVIEW

Rule 885. Scope of Review—Limited to Questions Decided by Lower Court.

This Court will not ordinarily decide any point or question which does not plainly appear by the record to have been tried and decided by the lower court; but where a point or question of law was presented to the lower court and a decision of such point or question of law by this Court is necessary or desirable for the guidance of the lower court or to avoid the expense and delay of another appeal to this Court, such point or question of law may be decided by this Court even though not decided by the lower court. Where jurisdiction cannot be conferred on the Court by waiver or consent of the parties, a question as to the jurisdiction of the lower court may be raised and decided in this Court whether or not raised and decided in the lower court.

E

U.S. SUPREME COURT RULES (1967)

Rule 23. The petition for certiorari

1. The petition for writ of certiorari shall contain in the order here indicated—

* * * * *

(f) If review of the judgment of a state court is sought, the statement of the case shall also stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e.g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of the court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari.

Where the portions of the record relied upon under this subparagraph are voluminous, then they shall be included in an appendix to the petition, which may, if more convenient, be separately presented.